

FILED BY *hds* D.C.

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE 05 JUN 13 PM 12:37  
WESTERN DIVISION

ROBERT B. DELTRACIO  
CLERK, U.S. DIST. CT.  
W.D. OF TN, MEMPHIS

MARTHA OWENS, as next of friend )  
of IDA TAYLOR, deceased, and on )  
behalf of the wrongful death )  
beneficiaries of IDA TAYLOR, )

Plaintiff, )

vs. )

No. 04-2928 BV

KINDRED HEALTHCARE SERVICES, )  
INC., KINDRED HEALTHCARE )  
OPERATING, INC., KINDRED NURSING )  
CENTER LIMITED PARTNERSHIP )  
d/b/a SPRING GATE )  
REHABILITATION AND HEALTHCARE )  
CENTER; RENEE B. TUTOR, in )  
her capacity as Administrator )  
of SPRING GATE REHABILITATION )  
HEALTHCARE CENTER,; DEBORAH )  
ANNE HANSBROUGH, in her capacity )  
as Administrator of SPRING )  
GATE REHABILITATION HEALTHCARE )  
CENTER; and ANGELA KAY )  
MCCOLLOUGH, in her capacity as )  
Administrator of SPRING GATE )  
REHABILITATION HEALTHCARE CENTER )

Defendants. )

ORDER GRANTING DEFENDANTS' MOTION FOR A PROTECTIVE ORDER

Before the court is the May 23, 2005 motion of the defendants, Renee B. Tutor, Deborah Ann Hansbrough, and Angela Kay McCollough, pursuant to Federal Rule of Civil Procedure 26(c)(1), requesting that the court enter a protective order providing that discovery

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not be had from them. This motion was referred to the United States Magistrate for determination. For the following reasons, the motion is granted.

#### BACKGROUND

This case was originally filed in the Circuit Court of Shelby County. The defendants removed the case to federal court pursuant to 28 U.S.C. § 1446. In the notice of removal, the defendants alleged that the three individual defendants were fraudulently joined in order to destroy the completeness of diversity of citizenship. The plaintiff subsequently filed a motion for remand to state court, contending that the joinder of the individual defendants defeated diversity of citizenship and the court thus lacked subject matter jurisdiction. In December of 2004, the defendants filed a response opposing the motion for remand and moved to dismiss the individual defendants. The motion to remand is currently pending before United States District Judge J. Daniel Breen.

On May 6, 2005, the plaintiff served the three individual defendants with a first set of interrogatories and requests for production of documents.

#### ANALYSIS

In *Shoemake v. Kindred Nursing Centers Limited Partnership, et al.*, No. 04-2835 BV, this court granted a similar protective order

under nearly identical facts. The court reasoned as follows:

Federal Rule of Civil Procedure 26(c)(1) permits the court to issue a protective order prohibiting discovery. The rule allows the court to "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . ." Fed. R. Civ. P. 26(c).

Kindred contends that regardless of the disposition of the motion to remand and the motion to dismiss the individual defendants, discovery from the individual defendants should not be had at this time. If the court finds that the individual defendants were not fraudulently joined, then the case will be remanded to the state court. An order remanding this case to state court would effectively deprive this court of jurisdiction to order discovery. Alternatively, if the court finds that the individual defendants were fraudulently joined and refuses to remand the case, then the individuals would no longer be parties subject to the discovery rules.

Consequently, any discovery requested from individuals who will either not be parties to this lawsuit or who will not be under the jurisdiction of this court would be wasteful, annoying, oppressive, and unduly burdensome and expensive.

[The plaintiff] contends that even if the individuals were not parties to the action, she would simply secure the same information requested through the issuance of a subpoena duces tecum under Federal Rule of Civil Procedure 45. If the court finds that the individuals were fraudulently joined as parties, then the case will remain in federal court, and [the plaintiff] may pursue discovery under Rule 45 at that time.

For the foregoing reasons, the defendants' motion for protective order is granted in this case. The plaintiff shall not have discovery under Federal Rule of Civil Procedure 26, 33, 34, 35, or 36 from Renee B. Tutor, Deborah Ann Hansbrough, and Angela

Kay McCollough until resolution of the pending motions to remand and to dismiss. All other discovery may proceed.

IT IS SO ORDERED this 13th day of June, 2005.

A handwritten signature in cursive script, reading "Diane K. Vesco", written in black ink.

DIANE K. VESCOVO  
UNITED STATES MAGISTRATE JUDGE



## Notice of Distribution

This notice confirms a copy of the document docketed as number 31 in case 2:04-CV-02928 was distributed by fax, mail, or direct printing on June 14, 2005 to the parties listed.

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Honorable J. Breen  
US DISTRICT COURT